BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

LUZ I COLON	**HEARING NUMBER:** 17BUI-08954
Claimant	
and	**EMPLOYMENT APPEAL BOARD DECISION**
R C CASINO LLC	
Employer	

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A, 730.5

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Luz Colon (Claimant) worked for R. C. Casino LLC (Employer) as a full-time slot attendant from May 26, 2016 until she was fired on August 14, 2017. The stated reason for the discharge was that the Claimant had failed a random drug test.

The Claimant was sent a certified letter telling her that the initial test was positive for a “controlled substance,” that she had seven days to request a test of the split sample, that the request must be made to the Employer and to Dr. Grubb, that the deadline for requesting the test was August 10, and that “you are responsible for the payment of such secondary testing.” (Ex. 4.) The Claimant declined retesting because she could not afford to pay for testing the split sample. (Ex. 5).

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2017) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
>
> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(a):

> *Misconduct* is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in the carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

"This is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d, 445, 448 (Iowa 1979).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000).

We have no doubt that having a positive test result for the use of a controlled substance in violation of the Employer's policy can constitute disqualifying misconduct. But the Iowa Supreme Court has ruled that an employer cannot establish disqualifying misconduct based on a drug test performed in violation of Iowa's drug testing laws. *Harrison v. Employment Appeal Board*, 659 N.W.2d 581 (Iowa 2003); *Eaton v. Employment Appeal Board,* 602 N.W.2d 553, 558 (Iowa 1999). The court in *Eaton* stated, "It would be contrary to the spirit of chapter 730 to allow an employer to benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits." *Eaton*, 602 N.W.2d at 558. Thus we must examine Iowa's drug testing statute to see if the employer has complied with its requirements.

Substantial compliance with Iowa Code §730.5 is sufficient. *Sims v. NCI Holding Corp*., 759 N.W.2d 333 (Iowa 2009). "Substantial compliance is said to be compliance in respect to essential matters necessary to assure the reasonable objectives of the statute." *Sims v. NCI Holding Corp*., 759 N.W.2d 333, 338 (Iowa 2009)(quoting *Superior/Ideal, Inc. v. Bd. of Review*, 419 N.W.2d 405, 407 (Iowa 1988)). *Sims* ruled that substantial compliance is sufficient to satisfy the notice provision of Iowa Code §730.5(7)(i). Even under this standard the Employer has not complied with the requirements of the Code.

In pertinent part §730.5(7) provides:

> i. (1) If a confirmed positive test result for drugs or alcohol for a current employee is reported to the employer by the medical review officer, the employer shall notify the employee in writing by certified mail, return receipt requested, of the **results of the test**, the employee's right to request and obtain a confirmatory test of the second sample collected pursuant to paragraph "b" at an **approved laboratory of the employee's choice**, and the **fee payable** by the employee to the employer for **reimbursement of expenses** concerning the test. The fee charged an employee shall be an amount that represents the costs associated with conducting the second confirmatory test, which shall be consistent with the employer's cost for conducting the initial confirmatory test on an employee's sample. If the employee, in person or by certified mail, return receipt requested, requests a second confirmatory test, identifies an approved laboratory to conduct the test, and pays the employer the fee for the test within seven days from the date the employer mails by certified mail, return receipt requested, the written notice to the employee of the employee's right to request a test, a second confirmatory test shall be conducted at the laboratory chosen by the employee. The results of the second confirmatory test shall be reported to the medical review officer who reviewed the initial confirmatory test results and the medical review officer shall review the results and issue a report to the employer on whether the results of the second confirmatory test confirmed the initial confirmatory test as to the presence of a specific drug or alcohol. If the results of the second test do not confirm the results of the initial confirmatory test, the employer shall reimburse the employee for the fee paid by the employee for the second test and the initial confirmatory test shall not be considered a confirmed positive test result for drugs or alcohol for purposes of taking disciplinary action pursuant to subsection 10.

Iowa Code §730.5(7)"i"(1)(emphasis added). In *Harrison v. Employment Appeal Board*, 659 N.W.2d 581 (Iowa 2003) the Court found that a phone call was insufficient notice of rights under 730.5(7)"i"(1). Thus any oral notice supplied by the Employer was insufficient by law, and so we focus on the content of the certified letter.

The Claimant argues that the Employer's *verbally* quoted price of $200 was excessive. The Claimant points to testimony in another hearing wherein the Employer testified that its costs for the initial test was $25. She argues that this eight-fold markup violates the requirement that "[t]he fee charged an employee shall be an amount that represents the costs associated with conducting the second confirmatory test, which shall be consistent with the employer's cost for conducting the initial confirmatory test…" Iowa Code §730.5(7)(i)(1). The problem for the Claimant is that the $25 figure does not appear in the record in *this* case. We decline to allow the Claimant to submit this evidence after the close of the record since all she had to do was just ask the Employer about the cost, and the Claimant was represented by counsel at the hearing. The Claimant in the alternative argues that the Employer had an affirmative obligation to prove compliance with this requirement. She argues that since the Employer did not put on evidence of the cost of its initial test in the *unemployment* hearing it failed to prove compliance with the "consistent cost" requirement. As a general matter we would not expect an employer proffering a drug test result into evidence to address *all* of the myriad requirements in §730.5. Yet it is also true that one offering evidence must lay a foundation, and the Employer here was aware that the Claimant had objected to the cost of the retest. The issue thus is whether an employer who knows that the cost of retest is an issue has to put on the evidence of the cost of the initial test to show that the costs are "consistent?" Since we do not find it necessary to rely on this point to resolve the matter, we decline to rule on the issue at this time.

Turning to the certified letter we find several flaws. First, the Claimant is not told that she could choose the laboratory. Second, the Claimant is not informed of the amount of the fee, or even an estimate thereof. Third, the Claimant is not informed that the fee would be reimbursed by the Employer if the second test came back negative. The "reasonable objectives" of these provisions include letting the worker know she is in charge of the second test, and what her financial risk is if she chooses the retest. Leaving out her ability to choose the lab means that a worker may very well forgo the retest thinking that she is stuck with the same lab. Such a worker, even if drug-free, may figure that if the lab made one error it would just make another one. Thus the lab choice option is not unimportant. This alone renders the notice sufficiently defective as to be out of compliance with the statute. Similarly, the cost of the test and the fact of reimbursement would make clear to a worker just what she loses, besides her job, if she fails a retest. Without this information a worker cannot make a reasonable calculation about whether to request the retest. Each of these flaws, alone, would also render the test out of substantial compliance. When added to the lab flaw, we have a worker who is told she risks an unspecified sum to have a retest by the same lab that returned a positive test the first time, and who is unaware that she gets the money back if the test comes back clean. We conclude that the notice was not in substantial compliance with the statute.

Since the Employer failed to substantially comply with §730.5, the results of the drug test must be excluded from our consideration. In the past a majority of this Board has held that failure to comply with a drug testing law only affects what <u>evidence</u> may be considered in an unemployment hearing. Under those rulings an allegation that misconduct was committed by a claimant is not automatically defeated simply by an employer's failure to comply with a drug testing law. Instead, those prior decisions of the Board have excluded from evidence the test results but held open the possibility that the claimant might be disqualified based on independent evidence of drug use. These rulings remain convincing to us based on the opinions of the Supreme Court decisions in *Eaton* and *Harrison.* But this approach, which is generally favorable to the position taken by employers, does not deny benefits to the Claimant in this particular case.

Generally, "[t]here must be a direct causal relation between the misconduct and the discharge… Simply put, we think an employer must establish that the employer discharged the claimant because of *a specific act or acts of* misconduct." *West v. Employment Appeal Board*, 489 N.W.2d 731, 734 (Iowa 1992)(emphasis in original); *accord Larson v. Employment Appeal Bd.*, 474 N.W.2d 570, 572 (Iowa 1991) (record revealed claimant was fired for incompetence; claim that she was fired for deceit was supplied by agency post hoc); *Lee v. Employment Appeal Board,* 616 N.W.2d 661, 669 (Iowa 2000)(incident occurring after decision to discharge is irrelevant). As we read this record the Employer would terminate the Claimant if and only if she tested positive on the drug test. A positive test result was necessary to the decision to terminate. With that test excluded from evidence, the Employer is left with no proof of the asserted misconduct that caused the discharge and benefits may not be denied.

Even if we were to find that the Employer terminated the Claimant on the grounds of illegal drug use, and not just a positive test result, we would still allow benefits. This is because, with the drug test result excluded, there is no evidence that the Claimant used illegal drugs at any time. Thus even if the discharge were for drug use, and not just the test result, the Employer has failed to prove such use, and failed to prove misconduct.

Finally, we note that the Employer now claims that it has since the hearing offered to pay for the test of the split sample. Since this is after the discharge, it is not relevant to the unemployment claim. It is not a definite offer of work and thus we do not remand for a refusal of suitable work. Meanwhile, the fact that an employer makes such a post-termination offer to pay for testing, while relevant to a *back pay* claim, does not render the prior test in compliance with §730.5. *See generally Sims v. NCI Holding Corp*., 759 N.W.2d 333, 340 (Iowa 2009)(finding violation and awarding fees but denying back pay based on post-termination test). In this connection we point out that "[a] finding of fact or law, judgment, conclusion, or final order made pursuant to this section by an employee or representative of the department, administrative law judge, or the employment appeal board, is binding only upon the parties to proceedings brought under this chapter, and is not binding upon any other proceedings or action involving the same facts brought by the same or related parties before the division of labor services, division of workers' compensation, other state agency, arbitrator, court, or judge of this state or the United States." Iowa Code §96.6(4)(emphasis added). This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise. See also Iowa Code §96.11(6)(b)(3)("Information obtained from an employing unit or individual in the course of administering this chapter and an initial determination made by a representative of the department under section 96.6, subsection 2, as to benefit rights of an individual shall not be used in any action or proceeding, except in a contested case proceeding or judicial review under chapter 17A…). On the other hand if the Claimant is reinstated by the Employer with back pay, and a period during which she received unemployment compensation is included in the back pay payment, then the parties should follow the procedures set out in 871 IAC 25.15 and Iowa Code §96.3(8).

DECISION:

The administrative law judge's decision dated September 21, 2017 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no disqualifying reason.

The Claimant submitted additional evidence to the Board which was not contained in the administrative file and which was not submitted to the administrative law judge. While the additional evidence was reviewed for the purposes of determining whether admission of the evidence was warranted despite it not being presented at hearing, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision. There is no sufficient cause why the new and additional information submitted by the Claimant was not presented at hearing. Accordingly none of the new and additional information submitted has been relied upon in making our decision, and none of it has received any weight whatsoever, but rather all of it has been wholly disregarded.

Kim D. Schmett

Ashley R. Koopmans

RRA/fnv

James M. Strohman